APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 01-3402, 02-1867, 02-1915

ZAPATA HERMANOS SUCESORES, S.A.,

Plaintiff-Appellee,

v.

HEARTHSIDE BAKING COMPANY, INC.,
D/B/A MAURICE LENELL COOKY COMPANY,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 4040—Milton I. Shadur, *Judge*.

ARGUED SEPTEMBER 13, 2002—DECIDED NOVEMBER 19, 2002

Before POSNER, DIANE P. WOOD, and EVANS, Circuit Judges.

POSNER, *Circuit Judge*. Zapata, a Mexican corporation that supplied Lenell, a U.S. wholesale baker of cookies, with cookie tins, sued Lenell for breach of contract and won. The district judge ordered Lenell to pay Zapata $550,000 in attorneys' fees. From that order, which the judge based both on a provision of the Convention on Contracts for the International Sale of Goods, Jan. 1, 1988, 15 U.S.C. App., and on the inherent authority of the courts to punish the conduct of litigation in bad faith, Lenell appeals.

The Convention, of which both the U.S. and Mexico are signatories, provides, as its name indicates, remedies for breach of international contracts for the sale of goods. Zapata brought suit under the Convention for money due under 110 invoices, amounting to some $900,000 (we round liberally), and also sought prejudgment interest plus attorneys' fees, which it contended are "losses" within the meaning of the Convention and are therefore an automatic entitlement of a plaintiff who prevails in a suit under the Convention. At the close of the evidence in a one-week trial, the judge granted judgment as a matter of law for Zapata on 93 of the 110 invoices, totaling $850,000. Zapata's claim for money due under the remaining invoices was submitted to the jury, which found in favor of Lenell. Lenell had filed several counterclaims; the judge dismissed some of them and the jury ruled for Zapata on the others. The jury also awarded Zapata $350,000 in prejudgment interest with respect to the 93 invoices with respect to which Zapata had prevailed, and the judge then tacked on the attorneys' fees—the entire attorneys' fees that Zapata had incurred during the litigation.

Article 74 of the Convention provides that "damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach," provided the consequence was foreseeable at the time the contract was made. Article 7(2) provides that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law [i.e., conflicts of law rules]." There is no suggestion in the background of the Convention or the cases under it that "loss" was intended to include attorneys' fees, but no suggestion to the contrary either. Nevertheless it seems apparent that "loss" does not include attorneys' fees incurred in the litigation of a suit for breach of contract, though certain prelitigation legal

expenditures, for example expenditures designed to mitigate the plaintiff's damages, would probably be covered as "incidental"damages. *Sorenson v. Fio Rito*, 413 N.E.2d 47, 50-52 (Ill. App. 1980); cf. *Tull v. Gundersons, Inc.*, 709 P.2d 940, 946 (Colo. 1985); *Restatement (Second) of Contracts* § 347, comment c (1981).

The Convention is about contracts, not about procedure. The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a part of procedural law. For example, the "American rule," that the winner must bear his own litigation expenses, and the "English rule" (followed in most other countries as well), that he is entitled to reimbursement, are rules of general applicability. They are not field-specific. There are, however, numerous exceptions to the principle that provisions regarding attorneys' fees are part of general procedure law. For example, federal antidiscrimination, antitrust, copyright, pension, and securities laws all contain field-specific provisions modifying the American rule (as do many other field-specific statutes). An international convention on contract law *could* do the same. But not only is the question of attorneys' fees not "expressly settled" in the Convention, it is not even mentioned. And there are no "principles" that can be drawn out of the provisions of the Convention for determining whether "loss" includes attorneys' fees; so by the terms of the Convention itself the matter must be left to domestic law (i.e., the law picked out by "the rules of private international law," which means the rules governing choice of law in international legal disputes).

U.S. contract law is different from, say, French contract law, and the general U.S. rule on attorneys' fee shifting (the "American rule") is different from the French rule (loser pays). But no one would say that French contract law differs from U.S. *because* the winner of a contract suit in France is entitled to be reimbursed by the loser, and in the U.S. not. That's an

important difference but not a contract-law difference. It is a difference resulting from differing procedural rules of general applicability.

The interpretation of "loss" for which Zapata contends would produce anomalies, which is another reason to reject the interpretation. On Zapata's view the prevailing plaintiff in a suit under the Convention would (though presumably subject to the general contract duty to mitigate damages, to which we referred earlier) get his attorneys' fees reimbursed more or less automatically (the reason for the "more or less" qualification will become evident in a moment). But what if the defendant won? Could he invoke the domestic law, if as is likely other than in the United States that law entitled either side that wins to reimbursement of his fees by the loser? Well, if so, could the plaintiff waive his right to attorneys' fees under the Convention in favor of domestic law, which might be more or less generous than Article 74, since Article 74 requires that any loss must, to be recoverable, be foreseeable, which beyond some level attorneys' fees, though reasonable ex post, might not be? And how likely is it that the United States would have signed the Convention had it thought that in doing so it was abandoning the hallowed American rule? To the vast majority of the signatories of the Convention, being nations in which loser pays is the rule anyway, the question whether "loss" includes attorneys' fees would have held little interest; there is no reason to suppose they thought about the question at all.

For these reasons, we conclude that "loss" in Article 74 does not include attorneys' fees, and we move on to the question of a district court's inherent authority to punish a litigant or the litigant's lawyers for litigating in bad faith. The district judge made clear that he was basing his award of attorneys' fees to Zapata in part on his indignation at Lenell's having failed to pay money conceded to be owed to Zapata. Although the precise amount was in dispute, Lenell concedes that it owed Zapata at least half of the $1.2 million that Zapata

obtained in damages (not counting the attorneys' fees) and prejudgment interest. Lenell had no excuse for not paying that amount, and this upset the judge.

Firms should pay their debts when they have no legal defense to them. *Pacta sunt servanda*, as the saying goes ("contracts are to be obeyed"). In the civil law (that is, the legal regime of Continental Europe), this principle is taken very seriously, as illustrated by the fact that the civil law grants specific performance in breach of contract cases as a matter of course. But under the common law (including the common law of Illinois, which is the law that choice of law principles make applicable in this case to any issues not covered in express terms by the Convention), a breach of contract is not considered wrongful activity in the sense that a tort or a crime is wrongful. When we delve for reasons, we encounter Holmes's argument that practically speaking the duty created by a contract is really just to perform or pay damages, for only if damages are inadequate relief in the particular circumstances of the case will specific performance be ordered. In other words, and subject to the qualification just mentioned, the entire practical effect of signing a contract is that by doing so one obtains an option to break it. The damages one must pay for breaking the contract are simply the price if the option is exercised. See Oliver Wendell Holmes, Jr., *The Common Law* 300-02 (1881); Holmes, "*The Path of the Law,*" 10 *Harv. L. Rev.* 457, 462 (1897).

Why such lenity? Perhaps because breach of contract is a form of strict liability. Many breaches are involuntary and so inapt occasions for punishment. Even deliberate breaches are not necessarily culpable, as they may enable an improvement in efficiency—suppose Lenell had a contract to take a certain quantity of tins from Zapata and found that it could buy them for half the price from someone else. Some breaches of contract, it is true, are not only deliberate but culpable, and maybe this was one—Lenell offers no excuse for failing to pay

for tins that it had taken delivery of and presumably resold with its cookies in them. Refusing to pay the contract price after the other party has performed is not the kind of option that the performing party would willingly have granted when the contract was negotiated. The option of which Holmes spoke was the option not to perform because performance was impossible or because some more valuable use of the resources required for performance arose after the contract was signed. Zapata argues, moreover, perhaps correctly (we need not decide), that Lenell refused to pay in an effort to extract a favorable modification of the terms of the parties' dealings, which would be a form of duress if Zapata somehow lacked an effective legal remedy. *Professional Service Network, Inc. v. American Alliance Holding Co.*, 238 F.3d 897, 900-01 (7th Cir. 2001); *Alaska Packers' Ass'n v. Domenico*, 117 Fed. 99, 100-04 (9th Cir. 1902). But Zapata did not charge duress, and probably couldn't, since it had a good remedy—this suit.

It is true that nowadays common law courts will sometimes award punitive damages for breach of contract in bad faith. But outside the field of insurance, where refusals in bad faith to indemnify or defend have long been punishable by awards of punitive damages to the insured, the plaintiff must show that the breach of contract involved tortious misconduct, such as duress or fraud or abuse of fiduciary duty. See, e.g., *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 982-83 (Ind. 1993); *Story v. City of Bozeman*, 791 P.2d 767, 776 (Mont. 1990); E. Allan Farnsworth, *Contracts* § 12.8, pp. 788-89 (3d ed. 1999). This is the rule in Illinois, *Morrow v. L.A. Goldschmidt Associates, Inc.*, 492 N.E.2d 181, 183-86 (Ill. 1986), and Zapata has not tried to come within it. For that matter, it did not ask for punitive damages, and the judge had no authority to award attorneys' fees in lieu of such damages. He could not have awarded punitive damages if Zapata had asked for them but had been unable to prove tortious misconduct by Lenell, and even more clearly he could not award them when they had not been requested.

The decision whether punitive damages shall be a sanction for a breach of contract is an issue of substantive law, and under the *Erie* doctrine a federal court is not authorized to apply a different substantive law of contracts in a diversity case from the law that a state court would apply were the case being litigated in a state court instead. And obviously that rule must not be circumvented by renaming punitive damages "attorneys' fees." *United States ex rel. Treat Bros. Co. v. Fidelity & Deposit Co. of Maryland*, 986 F.2d 1110, 1119-20 (7th Cir. 1993); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52-55 (1991); *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.*, 976 F.2d 541, 548-50 (9th Cir. 1992). It is true that this is not a diversity case, but the *Erie* doctrine applies to any case in which state law supplies the rule of decision, see, e.g., *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83-85, 87-88 (1994), here by incorporation in the Convention.

The inherent authority of federal courts to punish misconduct before them is not a grant of authority to do good, rectify shortcomings of the common law (as by using an award of attorneys' fees to make up for an absence that the judge may deem regrettable of punitive damages for certain breaches of contract), or undermine the American rule on the award of attorneys' fees to the prevailing party in the absence of statute. *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1318 (10th Cir. 2000); *Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.*, *supra*, 976 F.2d at 548-50 (9th Cir. 1992); *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226, 1232-33 and n. 9 (6th Cir. 1984) (en banc). These cases and others we could cite make clear that it is a residual authority, to be exercised sparingly, to punish misconduct (1) occurring in the litigation itself, not in the events giving rise to the litigation (for then the punishment would be a product of substantive law—designed, for example, to deter breaches of contract), and (2) not adequately dealt with by other rules, most pertinently here Rules 11 and 37 of the

Federal Rules of Civil Procedure, which Lenell has not been accused of violating.

Insofar as he focused on Lenell's behavior in the litigation itself, which, to repeat, is the only lawful domain of the relevant concept of "inherent authority"—the authority could not constitutionally be extended to give parties remedies not available to them under the law of the state that furnishes the substantive rules of decision in the case—the judge punished Lenell for having failed to acknowledge liability and spare Zapata and the judge and the jury and the witnesses and so on the burden of a trial. But as it happens, the fault here was in no small measure the judge's. Well before the trial, and long, long before Zapata's lawyers had run the tab up to $550,000, they had moved for partial summary judgment, claiming that Lenell in answer to Zapata's requests for admission had acknowledged liability for $858,000 of the $890,000 sought in the complaint. The judge had denied the motion on the ground that partial summary judgment cannot be granted unless the grant would give rise to an appealable judgment. This was error. Rule 56(d) of the civil rules is explicit in allowing the judge to grant summary judgment on less than the plaintiff's whole claim, and there is no hint of any requirement that the grant carve at a joint that would permit the judge to enter a final judgment under Rule 54(b). If the plaintiff had two separate claims, and the judge granted summary judgment on one and set the other for trial, he could also if he wanted enter final judgment on the first dismissal, enabling the defendant to appeal immediately under Rule 54(b). If instead the plaintiff had as here one claim, and the judge granted it in part, the defendant could not appeal—the conditions of Rule 54(b) would not be satisfied—yet it is evident from the wording of Rule 56(d) that this would be a proper partial summary judgment, for the rule expressly authorizes an order "specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy." No purpose would be served by confining the rule as the district

judge did. If anything, judicial economy is better served by a partial summary judgment that is *not* appealable, since a Rule 54(b) appeal normally interrupts the proceedings in the district court.

Since the challenged award of $550,000 in attorneys' fees cannot stand, we need not pick through the record to see whether some of the counterclaims or other moves by Lenell during the trial were sanctionable apart from Rule 11 and Rule 37. But it may be useful by way of guiding further proceedings on remand to point out that to the extent that those rules place limits on the award of sanctions under them (for example by the provision of safe harbors in Rule 11), those limitations are equally limitations on inherent authority, which may not be used to amend the rules. *Kovilic Construction Co. v. Missbrenner*, 106 F.3d 768, 772-73 (7th Cir. 1997). For federal rules of procedure have the force of statutes. See *id.*; 28 U.S.C. § 2072(b).

One issue remains for discussion. Although we have treated the appeal so far as if the only issues concerned attorneys' fees, Lenell also argues that the jury verdict should be set aside because the judge by his comments in open court signaled to the jury his scorn for Lenell's case. There were only a couple of such comments (many more, however, at sidebars outside the jury's hearing), and we do not think they could have changed the outcome. But we also think that judges should be very cautious about making comments in the hearing of a jury about the quality of a party's case or lawyers. For if he signals to the jury the judge's opinion as to how the case should be decided, he undermines the authority of the jury. *Collins v. Kibort*, 143 F.3d 331, 336 (7th Cir. 1998); *Nationwide Mutual Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 805, 808 (6th Cir. 1999); see also *Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1187 (7th Cir. 1992).

From what we have just reported about the judge's statements during the trial and from the tone of a number of

other statements that he made in the course of this litigation, we think it best that the further proceedings that we are ordering be conducted before a different judge, in accordance with 7th Cir. R. 36.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ZAPATA HERMANOS SUCESORES, S.A., *Plaintiff*,
v.
HEARTHSIDE BAKING CO., INC., etc., *Defendant*.

No. 99 C 4040.

Aug. 29, 2001.

MEMORANDUM OPINION AND ORDER

SHADUR, Senior District J.

After having prevailed in principal part before the jury that heard the litigants' major commercial dispute, Zapata Hermanos Sucesores, S.A. ("Zapata") has moved for an award of attorneys' fees on three alternative grounds, two of them advanced against defendant Hearthside Baking Co., Inc., d/b/a Maurice Lenell Cooky Co. ("Lenell") and the third advanced against Lenell's litigation counsel, Gordon & Centracchio, L.L.C. ("Law Firm"). This Court's August 22, 2001 memorandum opinion and order dealt with Zapata's motion against the Law Firm. Now the issues as between Zapata and Lenell have become fully briefed, and this memorandum opinion and order resolves that claim in favor of Zapata and against Lenell.

In an unsuccessful effort to "make the worse appear the better reason,"[1] Lenell's counsel lay heavy stress on the facts that Zapata has sued Lenell in a United States court and that the

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[1] John Milton, *Paradise Lost*, bk. II, ll. 113-14, likely drawn from Diogenes Laertius, *Socrates* 5.

well-known "American Rule" calls for litigants to bear their own legal expense. But in so doing, Lenell's counsel present their arguments in a way that impermissibly seeks to draw attention away from an exception that is built into the American Rule itself[2]--an exception that their Mem. 2 itself quotes from *F.D. Rich Co. v. United States f/u/o Industrial Lumber Co.*, 417 U.S. 116, 126 (1974) (internal quotation marks and citation omitted, but with appropriate emphasis added):

> The so-called "American Rule" governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees are not ordinarily recoverable *in the absence of a statute or enforceable contract providing therefor*.

Accord, such cases as *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975).

There is a reason of course that the doctrine on which Lenell seeks to rely is called the American Rule: This country is in the minority of commercial jurisdictions that do *not* make prevailing parties truly whole by saddling their adversaries with the winners' legal expenses--an omission that does not (as does the vast majority of other jurisdictions' fee-shifting approach) put the winners in contract disputes into the same economic position as if the breaching parties had performed their required obligations under the contracts (see John Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L LAW 1, 6-7 & nn. 20, 27 (1999) (reviewing identical principles applicable to litigation as well as arbitration); John Gotanda, SUPPLEMENTAL DAMAGES IN PRIVATE INTERNATIONAL LAW 146-73 (1998) (confirming those principles applicable in litigation)). In this instance two

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[2] As this opinion explains, that sleight-of-hand effort--better suited to a shell game along the midway of a state fair than to a legal memorandum--serves to obscure the true simplicity of the current inquiry

stipulations in which Lenell has joined bury its efforts to escape liability via the American Rule:

1. Both sides have agreed all along that their claims and counterclaims are governed by a treaty to which the United States is a signatory, the Convention on the International Sale of Goods ("Convention"). And here is the controlling provision of Convention Art. 74 ("Article 74") (emphasis added):

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party *as a consequence of the breach.* Such damages may not exceed the loss which the party in breach *foresaw or ought to have foreseen* at the time of the conclusion of the contract, in light of the facts and matters of which he then knew or ought to have known, *as a possible consequence of the breach of contract.*

2. Before trial the litigants entered into a June 8, 2001 Stipulation that provided in relevant part (again with emphasis added):

1. As of the dates when Lenell issued its purchase orders for the tins described in the invoices attached as Group Exhibit A to Zapata's Complaint in this case, *Lenell foresaw or should have foreseen that if Lenell failed to pay for the tins that it ordered, received and accepted, Zapata would incur litigation costs including attorneys fees, to seek payment of the invoices for said tins.*

2. The Court shall determine if attorney's fees are recoverable as a matter of law.

3. The amount of litigation costs, including attorneys' fees, to be assessed as consequential damages

> in this case, if any, will be for the Court to determine on a fee petition, rather than for the jury to decide.

There is no room to question the source of law to which this Court is to look to make the determination called for by the last-quoted Stipulation. With the Convention--a treaty--controlling the relationship between Mexican seller Zapata and United States purchaser Lenell, this Court has been called upon to exercise subject matter jurisdiction over Zapata's successful substantive claim in federal question terms. That of course calls into play federal choice-of-law principles rather than those of any state such as Illinois (see, e.g., *RTC v. Chapman*, 29 F.3d 1120, 1124 (7th Cir. 1994), citing the seminal decision in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 318 U.S. 487 (1941)). And relatedly, before trial Zapata dropped its alternative state law account-stated claim, which could perhaps have called diversity or supplemental jurisdiction (and thus local choice-of-law principles) into play as to that claim.

In that respect the existence or nonexistence of a fee-shifting rule is one of substantive policy (*Alyeska Pipeline*, 421 U.S. at 259 n.31; contrast *Midwest Grain Prods. of Ill., Inc. v. Productization, Inc.*, 228 F.3d 784, 787 (7th Cir. 2000), a diversity case on which Lenell unpersuasively seeks to rely). And a treaty, occupying international scope as it does and (as in this case) defining the relationships between nationals of different signatory countries, calls for uniformity of construction. Although written about a different provision of the Convention, the analysis in *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.F.A.*, 144 F.3d 1384, 1391 (11th Cir. 1998) applies with equal force to mandate universality rather than a purely home-town rule as to the awardability of attorneys' fees under the Convention:

> One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty

> as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply. *See* Letter of Transmittal from Ronald Reagan, President of the United States, to the United States Senate, *reprinted at* 15 U.S.C. app. 70, 71 (1997). Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.

It is therefore wholly misleading for Lenell to contend as it does for the parochial application of the American Rule (as by attempting to call *Midwest Grain* to its aid). Although the norm in our own judicial system is for each litigant in a purely United-States-based dispute to bear the burden of its own legal expense, that does not at all equate to the notion that public policy (or anything else) forbids a federal court's judicial enforcement of a different rule that is appropriately brought into play--indeed, the earlier-quoted language from *F.D. Rich* expressly contemplates such enforcement where there is a statute (and a treaty calls for an a fortiori application of that notion) that instead establishes a "loser pays" regime.

It surely cannot be said that Zapata opted for the application of Illinois substantive law (or for the American Rule as such) just by having sued Lenell in a jurisdiction that did not pose serious problems of the nature that would have been generated by an attempt to sue at Zapata's own home base in Mexico--that is, by selecting a forum where Lenell could not assert any otherwise available challenge to in personam jurisdiction and where a favorable judgment for Zapata would be directly enforceable and capable of execution. And when purely parochial considerations are put aside (quite properly so), it

cannot be gainsaid that the normal unstrained reading of Article 74 coupled with the above-quoted Stipulation calls for Zapata's recovery of its attorneys' fees as foreseen consequential damages.

When the searchlight of analysis is thus properly focused on the language of the Convention without any inappropriate overlay from the American Rule, the question becomes a simple one. As n.2 has said, it truly smacks of a shell game for Lenell to have entered into the commitments to which it has stipulated and yet to urge that Zapata's admittedly foreseeable legal expense ("which the party in breach [Lenell] foresaw or ought to have foreseen," in the language of Article 74) was not "suffered by the other party [Zapata] as a consequence of the breach" (again the language of Article 74). It is totally unpersuasive for Lenell's counsel to contend instead that those commitments and Lenell's admissions do not equate to saying that attorneys' fees are "consequential damages" recoverable under the Convention.[3]

That distorted reading of the language is clearly refuted by the decisions cited at Zapata Mem. 4 from other countries' courts and arbitral tribunals. Obviously unable to counter directly, Lenell attempts to draw an inference from cases that decide the applicable *interest rate* under the Convention--not the right to the *payment of interest*, which the Convention

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[3] As hackneyed as the reference has become, it is hard to resist repeating the familiar quotation from Lewis Carroll's *Alice Through the Looking-Glass* ch. 6:

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master--that's all."

For the reasons explained here, Lenell and its counsel will not be permitted to emulate Humpty Dumpty--except of course for their sharing the ultimate fate of having a great fall.

admittedly calls for--under local law. But that effort to equate those issues really misses its mark, for the following explanation demonstrates that such interest-rate-related rulings really support Zapata's position rather than Lenell's.

Look at the situation of the injured seller of goods and what is required to make it whole. There is of course no near-universal rate of interest on unpaid obligations, and the drafters of the Convention took note of the fact that some sellers injured by nonpayment for their goods would be made whole by applying the interest rates at their homes, while others would need prejudgment interest to be paid at the rate applicable at their buyers' locales to provide full relief (see Peter Schlechtriem, UNIFORM SALES LAW--THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 98-99 (Manz, Vienna 1986). For that reason the Convention's drafters called for the payment of prejudgment interest (which every unpaid seller needs for full recovery), but compromised by leaving the interest rate open for decision on a case-by-case basis (*id.*)--so that the injured seller's make-whole expectations are met by compensating it for its own cost of delayed payment as well as recovering the payment itself.

Now look at the situation of the same injured seller in terms of the other component of being made whole. Exactly as with prejudgment interest, that result is assured *only* by freeing its damages recovery from the burden of attorneys' fees. Little wonder, then, that the award of such fees is nearly universal among commercial nations (see the two Gotanda publications cited earlier). And surely in this instance, the make-whole expectations of the injured seller--a Mexican company--are best met by conforming to Mexico's own adherence to that nearly universal rule.

In sum, the award of attorneys' fees has really been agreed to, although Lenell does not now acknowledge it,[4] by the combination of Lenell's stipulation and Article 74. Because the amount of the fee award remains to be resolved, a status hearing is set for 9 a.m. September 5, 2001, to discuss the procedure and timing for that purpose.

Although what has been said to this point is dispositive of the issue, it is worth looking at Zapata's other string to its bow: its invocation of the inherent-power predicate for imposing a litigant's fees on its adversary where the adversary has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons" (*F.D. Rich*, 417 U.S. at 429) in its prelitigation or litigation conduct or both. Although *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) has become the most recent definitive case in that respect, the Supreme Court had earlier confirmed that teaching in such cases as *Hall v. Cole*, 412 U.S. 1, 15 (1973), reconfirmed in *Roadway Express, Inc. v. Piper*, 447 U.S. 752,

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[4] Lenell has studiously sought to avoid the fact that its own Amended Counterclaim filed January 3, 2000 (comprising a whole set of claims arising out of asserted late deliveries and other alleged nonperformance by Zapata) sought not only compensatory damages of some $225,000 but also, as part of its requested judgment on that counterclaim (emphasis added):

> In favor of Lenell and against Envases, awarding Lenell its interest, costs, disbursements, consequential damages, *attorneys fees* and other and further relief as this Court deems just and proper.

But now that the shoe is on the other foot, Lenell's position has mysteriously become that the attorneys' fees that *it* specifically sought under the Convention are somehow nonrecoverable by Zapata because of the American Rule. Leaving aside the level of hypocrisy (or perhaps even estoppel or "mend the hold" principles) raised by Lenell's stance, it need scarcely be added that whether under the Convention or otherwise, the case for attorneys' fees sought by a prevailing party from Mexico (where local law awards them) necessarily has to be stronger, if anything, than a like claim by an Illinois party (where local law does not).

766 (1980); *Alyeska Pipeline*, 421 U.S. at 258-59; and *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978).[5]

This Court has already spoken and written at some length about the bad faith with which Lenell and its people conducted their dealings with Zapata and then, when they ceased to do business with Zapata and the latter was forced to sue to collect for the unpaid sale price of its tins, with which they conducted this litigation. Instead of repeating that discussion, this opinion attaches Zapata Mem. 2-3, which provides an encapsuled and accurate description of Lenell's activity. That conduct by Lenell both leading up to and during the litigation supports an award of attorneys' fees pursuant to the inherent power doctrine under the cited Supreme Court decisions and such other cases as *United States v. Fidelity & Deposit Co.*, 986 F.2d 1110, 1120 (7th Cir. 1993).[6]

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[5] This opinion has used the term "teaching" advisedly, for Lenell's counsel--unable in any other way to blunt the force of what the Supreme Court has opined--has retreated to the fallback position of seeking to "distinguish" those cases because each of them involved a differing factual scenario. But it is a truism that every case is "distinguishable" from every other case in that limited sense. What is significant instead is that the Supreme Court has repeatedly and expressly stated the scope of the inherent power doctrine in the terms described in the text here--and this opinion is directly faithful to that unambiguous teaching.

[6] Because Lenell's late-advanced artwork counterclaim is pending before one of this Court's colleagues, this opinion has carefully steered clear of any substantive comments on that score. But this Court cannot help but remark that when Lenell and its counsel took a second look at Lenell's potential offensive position at the very beginning of the year 2000 (this action had been filed by Zapata in June 1999, Lenell filed its Answer and Counterclaim in August 1999 and then Lenell's Amended Counterclaim was submitted on January 3, 2000), that Amended Counterclaim catalogued no fewer than eight separate alleged breaches by Zapata that added up to the $225,000-plus counterclaim figure. Yet that second look, which was obviously the consequence of a fine-tooth-combing of the entire Zapata-Lenell relationship, contained not a whisper as to any alleged counterclaim for the

CONCLUSION

More than one line of analysis confirms Lenell's obligation to bear Zapata's attorneys' fees, so that Zapata may be made whole for the damages and expenses it has been forced to bear due to Lenell's misconduct. As stated earlier, with the next step being the quantification of that amount, this action is set for a next status hearing at 9 a.m. September 5, 2001.

[Zapata Mem. 2-3, incorporated by the district court as part of this opinion, see App., *supra*, 19a, follows verbatim.]

bad faith refusal to pay *anything* for the hundreds of thousands of tins that it received and used years ago, and its continuing course of misconduct throughout this litigation in denying any liability to Zapata, thereby dramatically and needlessly expanding the scope of this litigation to cover invoices for which Lenell had absolutely no defense against payment as a matter of law.

Under domestic law, this Court possesses the inherent power to award attorneys' fees and expenses where such fees and expenses are incurred as a result of bad faith conduct. *Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991). It is difficult

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nonreturn of artwork belonging to Lenell. There is no question that Lenell was both then and earlier in possession of every fact regarding that relationship (which had terminated nearly a year earlier)--Lenell's own key witnesses so testified during the trial. Yet it was not until later, when the case called for the preparation of the final pretrial order (the prelude to trial), that the supposed artwork claim miraculously sprang to life in the form of still another proposed amendment to Lenell's counterclaim. And of course no plausible argument could be advanced that anything in the discovery process was needed to learn the existence of such a claim--as just stated, all of the underlying facts were already in Lenell's own possession. Although the as-yet-unresolved artwork issue has not formed part of the matrix for decision here, Lenell's attempt to delay the day of reckoning by the belated injection of that added claim surely seems suspect.

to imagine a clearer case of bad faith than this one. Indeed, Terry Cohen admitted on the witness stand that on March 10, 1999, in response to Zapata's decision not to ship any more tins to Lenell until Lenell paid its past due balance in full, he threatened Zapata that as a former supplier, Zapata would no longer have any priority for payment. That testimony speaks volumes of Lenell's true motivation. As Mike Gibson and Dennis Headley both testified, Terry Cohen told Zapata in no uncertain terms that if Zapata stopped shipping any more tins to Lenell, Zapata would never get paid– and, in fact, that is exactly what happened. Since that date more than two years ago, Lenell has refused to pay Zapata even a *dime* for any of the 1.6 million tins that Lenell kept and used even though Lenell's own records showed it owed Zapata hundreds of thousands of dollars for the tins. Lenell thus carried out its threat as retribution for Zapata's audacious decision not to ship any more tins until Lenell paid for the tins it had already received.

To make matters even worse, Lenell decided to make it as difficult and expensive as possible for Zapata to receive its money in this litigation. Despite its own accounting records, and the fact that Lenell had absolutely no defense to payment of invoices totaling $857,796.90, Lenell answered the complaint by generally denying that Lenell "breached its contractual obligation" and by specifically denying that Lenell as "liable for *any* damages for any alleged breach." Answer, ¶ 2 (emphasis added) (attached hereto as Ex. 2). Lenell never amended this answer. Through its general denial, Lenell dramatically expanded the scope of this litigation, including discovery and the trial, by forcing Zapata to undertake the difficult and time-consuming task of proving its entitlement to payment for more than 100 invoices that Lenell knew full well it was obligated to pay.

Lenell's general denials also could not have been the product of any mistake, or any claim that it lacked sufficient information to confirm its obligation to pay Zapata's uncontested invoices. At the very outset of this litigation,

Lenell answered Zapata's requests for admission, and admitted to receiving, accepting and using virtually all of the tins that have been the subject of this litigation, thereby establishing the very facts that, after a lengthy and needless trial, entitled Zapata to judgment as a matter of law with respect to those invoices.

In the simplest terms, this is a case of an extreme bad faith refusal to pay, both before and during this litigation, and which continued through the trial itself. Accordingly, Zapata is entitled to recover its attorneys' fees not only as an element of consequential loss under the Convention, but under the Court's inherent power to award attorneys' fees in cases of bad faith; and pursuant to 28 U.S.C. § 1927.

Milton I. Shadur
Senior United States District Judge

Date: August 28, 2001

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ZAPATA HERMANOS SUCESORES, S.A., *Plaintiff*,

v.

HEARTHSIDE BAKING CO., INC., etc., *Defendant*.

No. 99 C 4040.

March 12, 2002.

MEMORANDUM OPINION AND ORDER

SHADUR, Senior District J.

Since the issuance of this Court's February 12, 2002 memorandum opinion and order ("Opinion") dealing with one aspect of the award to Zapata Hermanos Sucesores, S.A. ("Zapata") of certain attorneys' fees and expenses that it has paid and incurred in connection with its completed litigation against Hearthside Baking Co., Inc. d/b/a Maurice Lenell Cooky Co. ("Lenell"), the parties have completed their evidentiary presentations on that subject. At this point the matter is ripe for disposition.

To a greater extent than was the case as to the underlying merits of the litigation (in which a very minor part of Lenell's opposition to Zapata's claim proved to be viable), Lenell has come up empty--in this instance, totally empty--on the issue of fees and expenses. Just as Lenell succeeded in dragging out what should have been a relatively simple collection case for goods sold and delivered by interposing a host of unwarranted roadblocks that unjustifiably converted the litigation into an enormously time-consuming and expensive lawsuit, so its

efforts to attack the fee request by Mayer Brown & Platt (now Mayer Brown Rowe & Maw, but referred to here for convenience simply as "Mayer Brown") has done nothing more than to roil the waters without impeaching that request in any respect whatever.

To begin with, Lenell's purported expert--a lawyer of some 25 years' standing, on whose opinions Lenell seeks to bottom the bulk (though not all) of its opposition--appears from his resume to be an experienced litigator. But as his Fed.R.Civ.P. ("Rule") 26(a)(2)(B) report and his hearing testimony have made abundantly clear, and as this opinion will explain in some detail, he has shown himself to be entirely unqualified to render a credible opinion on the issues posed by this case. Whether or not he might have placed himself in a position to do so by striving to build on his existing foundation as a practitioner, through the extensive amount of further analysis, further research and further work that would have been required to that end is a moot issue--for what controls instead is that he did *not* engage in that major building project[1]. And as for Lenell's lawyer handling the fee litigation itself,[2] he frittered away his, opposing counsel's and this Court's time in attempted challenges that also cannot survive any reasoned scrutiny.

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[1] For that reason this opinion will consistently place the word "expert" in quotation marks. Without that cautionary usage--because to label someone unqualifiedly as an "expert" tends to lend credence to whatever that person has said--the attribution of that presumed badge of credibility might have blunted the force of the criticisms voiced here. As is demonstrated in spades in this opinion, there is no way in which the opinions voiced by Lenell's witness can be characterized as exhibiting any quality of expertise in terms of the situation presented by this case.

[2] This is framed in the singular because, although a second lawyer also filed an appearance on Lenell's behalf, he really played no active role in the fee proceeding.

To return to Lenell's claimed "expert," some idea of the real absurdity of his opinions may be gleaned from his repeated emphasis that this was a collection case--a simple case of goods sold and delivered--so that the hourly rates charged by Mayer Brown were assertedly excessive. As the "expert" said at the outset of his statement in that respect in his Rule 26(a)(2)(B) report:

> This case did not involve a technical or novel area of law, but was a collection case for monies owed for goods supplied.

And given that skewed view (more of this later), what did the "expert" tender as assertedly comparable litigation? Two lawsuits that his law firm had brought in the Municipal Department of the Circuit Court of Cook County on behalf of Ameritech against lessees that were in default under equipment leases, one of those lawsuits asserting damages of less than $3,000 and the other claiming damages of less than $4,000. Total attorneys' fees sought in each case were $1,000, at an hourly rate of $160. For the claimed "expert" to suggest that those lawsuits could be the source of probative evidence as to this case--a case involving a claim of some $1.3 million for a very large number of deliveries of cookie tins, hopelessly complicated as the case was made by Lenell by creating the need to investigate, prepare for and successfully oppose Lenell's late-advanced, convoluted, multifarious and (regrettably) baseless defenses and counterclaims, might have been thought of as a bad joke had it not been for the "expert's" having advanced his argument with a straight face.[3]

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[3] To obtain a further demonstration of why no legitimate claimant to the mantle of an expert could characterize the underlying litigation here as a simple and straightforward collection matter (or as a simple breach of contract lawsuit), one need only review the trial transcript, as well as the series of opinions that this Court was called upon to render to resolve a host of hotly-disputed aspects of the case--e.g., this Court's December 8, 2000 opinion ruling on the parties' respective motions in limine; its lengthy July

That same oversimplistic (and insupportable) approach marked what the "expert" labeled as his "survey" of relevant market hourly rates in the Chicago area. First, to characterize what was done as a survey at all is wholly at odds with the methodology required of *any* valid survey. All that the "expert" did was to self-select a small sample of a handful of small law firms (about a dozen in number) that he knew to be involved in the handling of such collection cases as he mischaracterized this litigation to have been.[4] Even apart from that wholly unscientific approach to the conduct of any survey properly understood, the effort was doomed to failure because it proceeded from the "expert's" commitment to a totally false premise about the nature of the litigation. In the computer field such efforts, proceeding from a mistaken assumption to a necessarily mistaken conclusion, long ago earned the sobriquet "GIGO": "Garbage in, garbage out."

18, 2001 opinion and judgment order rejecting, as to all but two minor adjustments, Lenell's post-verdict Rule 50 and Rule 59 motion ("all of it of the type that attempts to fling gobs of mud toward a wall or ceiling, hoping that as much as possible will stick"); its brief July 19 opinion rejecting still another Lenell "dog-in-the-manger approach" in the form of a second Rule 59 motion; its August 22 opinion (155 F.Supp.2d 969) holding Lenell's counsel liable for Zapata's incremental lawyers' fees attributable to the Lenell lawyers' violation of 28 U.S.C. § 1927; and its August 28 opinion holding Lenell itself liable for the fees that are ultimately dealt with in this opinion, a liability supported both by the Convention on the International Sale of Goods and, secondarily and alternatively, by application of the inherent power doctrine.

[4] That process was further skewed by the "expert's" additionally mistaken perception that what was called for here was equivalent to obtaining Bankruptcy Court approval of a claim for fees based on the known need for such approval from the outset, as contrasted with the substantively different situation explained and discussed in the Opinion and the precedents relied upon there. Indeed, all too much of the "expert's" direct testimony was taken up with that nonanalogous subject.

It would be possible to dissect the "expert's" opinions on the subject of the appropriate hourly rates strand by strand, repeatedly exposing the groundlessness of those opinions, but it is scarcely necessary to do so. Perhaps the most graphic demonstration of what has to be viewed as a worthless opinion on the subject came in the witness' response to the final question posed to him during his examination on the stand, one posed by this Court: When asked whether he was even *aware* of the two critically important decisions by our Court of Appeals that were cited and quoted in Opinion at 4-6 (the *Balcor* and *Medcom* cases), the "expert" was candid enough to say "no."[5] For anyone who holds himself out as qualified to render an opinion on fees in a case such as this one not to have done the necessary homework to learn (let alone to know in advance) about such highly relevant authorities, so that the witness might at least attempt to explain why they are not persuasive (let alone controlling) authorities here, is to confirm that witness' total *lack* of qualification.

It is also frankly unnecessary to go through the step by step analysis marked out by *Daubert v. Merrell Dow*

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[5] As the Opinion pointed out, those decisions conclusively show the wrongheadedness of the approach voiced in the "expert's" Rule 26(a)(2)(B) report (which was repeated at length in his testimony):

> The hourly rates charged by the plaintiff's counsel exceed the market rate in the Chicagoland area for comparable services by attorneys with equal or greater experience. The rates charged by plaintiff's counsel's firm do not accurately reflect the actual Chicagoland market rate for attorneys in the area of commercial litigation or international business litigation. The rates set by Mayer, Brown and Platt are not based upon the actual market for legal services in the Chicago area, but are arbitrarily set and raised. The rates charged for a case of this nature are excessive.

But even if the "expert's" just-stated view of the market were somehow to be accepted, his unreliable methodology referred to in the preceding paragraph of the text saps his opinions of any force.

Pharmaceuticals, Inc., 509 U.S. 579 (1993) as refined by *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)--and as both of those seminal authorities have been reinforced by the recently revised Fed.R.Evid. ("Evid. R.") 702 and its accompanying Committee Note--to confirm the inadmissibility of opinion evidence such as that proffered by Lenell here. What has already been said really torpedoes that opinion both in terms of its utter lack of reliability (*Daubert*, 509 U.S. at 589-90) and "fit" (*id.* at 591)--in the latter respect, the opinion's total failure to fit "the particular circumstances of the particular case at issue" (*Kumho*, 526 U.S. at 150).[6] And those deficiencies in turn support the outright rejection as inadmissible of the entire aspect of the "expert's" opinion dealing with hourly rates. But even were that testimony to be found technically admissible, it is so flawed as to compel its rejection on grounds of weightlessness. Instead the evidence squarely supports the reasonableness of the rates that were charged by the Mayer Brown lawyers and were then vetted and approved by Zapata's general counsel--not only under the principles set out in *Balcor* and *Medcom*, but independently of those decisions as well.

To shift to consideration of the reasonableness of the time spent by the Mayer Brown attorneys in the litigation, the just-explained total unreliability of the Lenell "expert's"

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[6] As chance would have it, the writer of this opinion (who now chairs the Judicial Conference's Advisory Committee on the Rules of Evidence) was, at the time that the December 1, 2000 amendment to Evid. R. 702 and its accompanying Committee Note were in the lengthy gestation process leading to adoption, the chair of the Advisory Committee's subcommittee assigned to the project of addressing Evid. R. 701 through 703. In that capacity the writer had the primary responsibility for reviewing and for placing into their ultimate form the versions of Evid. R. 702 and the Committee Note originally drafted for Committee consideration by its outstanding reporter, Professor Dan Capra of Fordham Law School. And as a reading of the extensive Committee Note will disclose, it (like *Daubert* and *Kumho*) fully anticipated the type of unreliable and ill-fitting opinions that have been proffered here--and it too teaches the flat-out rejection of such opinions.

opinion as to hourly rates points to the discrediting of his views on the subject of time expenditure as well. On that score, this is one case that merits application of the principle "falsus in uno, falsus in omnibus," for once again the reliability of the "expert's" opinion as to time spent is fatally distorted by his misperception of the underlying litigation as a straightforward collection matter. That negates any degree of credence to be ascribed to the "expert's" notion of what time budget should be attributed to the case. Instead this Court finds totally credible the testimony of Zapata's attorneys--most particularly the thorough explanation given by Mayer Brown's Javier Rubinstein in his rebuttal testimony--as to (1) the reasons for the use of three lawyers in the case (with no duplication of effort being involved) as well as to (2) the reasonableness of the numbers of hours devoted to the litigation.

While the discussion to this point has shown how the exposure of the opinions of Lenell's purported "expert" to the sunlight of analysis has shriveled those opinions into nothingness, the balance of this opinion will address how the efforts by Lenell's hearing counsel to impugn the time charges by the Mayer Brown lawyers were even worse--were downright bogus. Thus, for example, the protracted interrogation by Lenell's counsel about a claimed lack of detail reflected in the time entries (most extensively by criticizing the entries' listing of "trial preparation" without particularization as to the specific tasks involved) was totally bootless as a challenge to those entries. That bootlessness is twofold.

First, all of the Mayer Brown time entries were prepared solely for consideration by its client Zapata, *not* in contemplation of court review. This was not a situation involving a fee-shifting statute (see the rejection of that claimed analogy in *Medcom*, 200 F.3d at 520-21). Not only were the bills prepared for Zapata's consumption alone, but its house counsel vetted and approved all of those bills (as stressed in *Balcor*, 73 F.3d at 153).

Second and just as importantly, Mayer Brown expressly *invited* Lenell's counsel to pose any questions at all having to do with providing more detailed descriptions of any time entries, so that the Mayer Brown lawyers could then go back if necessary to reconstruct just what particular work was being done at any given time. Here is the last paragraph of the November 16, 2001 letter from Mayer Brown's Thomas Lidbury to Lenell's counsel Timothy Touhy (Zapata Fee Ex. 2):

> If you have any other questions please let me know. In particular, if any of your objections are based upon a lack of detail, or hinge in some way on additional information about an entry, please let me know. We should deal with that sort of thing before we both brief the issue.

No response whatever came back from Lenell's counsel during the ensuing months before the evidentiary hearing. For attorney Touhy now to challenge and cavil at any claimed lack of detail, as he did by repeated questioning of the Mayer Brown lawyer witnesses during the hearing, can only be viewed as the bad faith pursuit of this fee litigation.

That was equally true of the attempt by Lenell's counsel Touhy to charge Mayer Brown with the expenditure of excessive time--an effort that took the form of contrasting the recorded 234 hours of "T1" trial preparation entries (time that was spent in getting ready for an anticipated, but then postponed, February 2001 trial date) with the 336 hours of "T2" trial preparation entries (reflecting time spent thereafter in getting ready for the actual June 2001 trial). Lenell's counsel sought to portray that as the needless expenditure of nearly another 150% of the original time to "get ready" for a case that had already been trial-ready.

Not so: Cancellation of the first (February) trial date came with 11 days left to go before the anticipated D Day of February 19--time that would have involved the most concentrated activity of what Mayer Brown's Rubinstein described as an

expected ten hours per day for each lawyer on a seven-day-work-week basis. When that time, which would have been required (and spent) if the February date had been adhered to (a subject on which this Court finds the testimony of attorney Rubinstein entirely credible), is properly moved from the T2 to the T1 category, it can be seen that no padding or excessiveness was involved. Any modest amount of work that had to be redone to prepare for the June trial was the natural consequence of the Mayer Brown attorneys' having to get the trial engine revved up again (including any necessary refresher work) after the ignition had been turned off in February.

Still another aspect of Lenell's attack that can be perceived only as advanced in bad faith is its counsel's attempt to question and stress the fact that about $150,000 of the $440,000-plus of fees (exclusive of interest) that are sought to be recovered in this proceeding has not yet been paid by Zapata. In that respect Zapata's trial counsel explained that was the result of insufficient cash flow being sustained by Zapata--scarcely surprising in light of the still-continued failure by Lenell to pay even $1 toward its obligations, even though its own records have always shown that it owed Zapata far, far in excess of a half million dollars. In fact Zapata acknowledges that it is firmly obligated to Mayer Brown for the entire amount billed by the law firm, and Zapata continues to make further payments on account as its cash flow permits. For Lenell to dispute any part of the fees claim because such fees have not yet been paid by Zapata--a factor due entirely to the manner in which Lenell has dishonored its own acknowledged obligations to Zapata--has (as this Court has previously said) exactly the same degree of merit as the plea of the defendant who, having been found guilty of murdering both his parents, asks the court for mercy because he is an orphan.

This opinion has sought to deal in terms only with the highlights (or more accurately the lowlights) of Lenell's attempted onslaught on the Zapata request. Suffice it to say that

this Court has examined and has carefully considered every other argument presented by Lenell and has found them all equally wanting (so that any absence of express treatment in this opinion should be viewed as without significance). On the other side of the coin, Zapata's evidentiary presentation has been wholly credible and entirely persuasive.

Accordingly the Zapata motion is granted in its entirety. Its Fee Ex. 6 has calculated compound interest through various dates, and the one applicable to this opinion (projecting one more day for docketing) calls for $43,357.64 in compound interest in addition to the principal sum of $493,746.14, or a total of $537,103.78. Judgment is therefore ordered to be entered in favor of Zapata and against Lenell in that aggregate sum of $537,103.78.[7]

Milton I. Shadur
Senior United States District Judge

Date: March 13, 2002

[7] This opinion has not taken account of the possibility of awarding fees for services rendered by Mayer Brown in this fee proceeding itself, a type of award that our Court of Appeals has approved from time to time despite the prospect described by Jonathan Swift's lines of doggerel:

> So, naturalists observe, a flea
> Hath smaller fleas that on him prey;
> And these have smaller still to bite 'em;
> And so proceed *ad infinitum*.

In that respect it would of course be possible to avoid Zeno's Paradox (another expression of the same ad infinitum proposition) by estimating the amount of time and therefore the fees attributable to the final increment of fees-on-fees work.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 01-3402

ZAPATA HERMANOS SUCESORES, S.A.,

Plaintiff-Appellee,

v.

HEARTHSIDE BAKING COMPANY, INCORPORATED, doing business as MAURICE LENELL COOKY COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 4040—Milton I. Shadur, *Judge*.

January 9, 2003

Before
Hon. Richard A. Posner, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Terrence T. Evans, *Circuit Judge*

ORDER

On December 3, 2002, plaintiff-appellee filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of

the active judges* has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

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* Hon. Joel M. Flaum and Hon. Ann Claire Williams did not participate in the consideration of the petition.

APPENDIX E

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 15 U.S.C.A. App.

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.